

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

LOUIS W. LOVE

Claimant

VS.

AIFAM ENTERPRISES, INC.

Respondent

AND

LIBERTY MUTUAL INSURANCE CO.

Insurance Carrier

Docket No. 190,944

ORDER

An Application for Review by Board of Appeals was filed by claimant. It "applies to the Board of Appeals for a review of the Order entered herein on the 27th day of June, 1996." Our review of the administrative files reveals no such document. The file does contain an Order Denying Compensation dated June 26, 1996, by Administrative Law Judge Jon L. Frobish. This Order pertains to a preliminary hearing held June 26, 1996. As there is exists no order subsequent to June 26, 1996, nor any record of a hearing having been conducted subsequent to the June 26, 1996, preliminary hearing, the Appeals Board will consider the claimant's Application for Review as pertaining to the June 26, 1996, preliminary hearing Order Denying Compensation. Also, we note that there is no brief or other responsive pleading from respondent. Thus, respondent's position with regard to this appeal is not known.

ISSUES

Claimant's Application for Review by Board of Appeals provides that "the specific issues Claimant wishes to address" are:

- “1. Whether it is proper to dismiss a case involving personal and psychological injuries because the Claimant requests medical treatment for psychological injuries.
- “2. Whether it is proper to dismiss a claim after a preliminary hearing related to medical treatment and reinstatement of temporary total payments.
- “3. Whether it is proper to dismiss a claim before the matter has been submitted for final ruling.
- “4. Whether a new judge should be assigned to hear the matter on remand.”

In the Brief of Appellant, claimant states the issues as follows:

- “1. Was the finding and conclusion of noncompensability supported by substantial competent evidence?
- “2. Did the Court have authority at the preliminary stage of these proceedings to conclude the ultimate issue of compensability?”

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon our review of the evidentiary record, including the transcript of the June 26, 1996, preliminary hearing and exhibits attached thereto; the May 3, 1996, evidentiary deposition of Mitchel A. Woltersdorf, Ph.D., and exhibits attached thereto; together with the documents contained within the administrative file maintained by the Division of Workers Compensation and having reviewed the Brief of Appellant, the Appeals Board finds, for purposes of preliminary hearing, as follows:

Claimant was injured in a motor vehicle accident on May 11, 1993. The fact that the motor vehicle accident arose out of and in the course of claimant's employment with the respondent does not appear to be in dispute. In addition to physical injury, claimant also developed psychological problems which required extensive counseling, confinement, and medication. The respondent paid temporary total disability compensation and medical benefits for a period of time until they were cut off following the receipt of a neuropsychological assessment report by Dr. Woltersdorf. Claimant sought a restoration of those benefits and the June 26, 1996, preliminary hearing before Administrative Law Judge Jon L. Frobish followed therefrom.

Because there appears to be an issue as to what was intended by or what the effect is of Judge Frobish's June 26, 1996, Order Denying Compensation, we will recite the contents of that Order herein. Judge Frobish found:

"That the Claimant suffered an injury, however, the traumatic neurosis does not stem from the physical injury to the Claimant. The Court finds that the traumatic neurosis stems from the Claimant's feelings of guilt associated with the death of the other driver and are therefore not compensable under Kansas law. The Claimant's request for temporary total disability and reimbursement of medical expenses related psychiatric care are denied."

Claimant asks in his Application for Review: (1) whether it is proper to dismiss a case involving personal and psychological injuries because the claimant requests medical treatment for psychological injuries; (2) whether it is proper to dismiss a claim after a preliminary hearing related to medical treatment and reinstatement of temporary total payments; and, (3) whether it is proper to dismiss a claim before the matter has been submitted for final ruling. However, the Appeals Board finds no evidence that the Administrative Law Judge dismissed this claim. The Administrative Law Judge denied claimant's request for preliminary hearing benefits of temporary total disability compensation and payment of medical expenses related to claimant's psychiatric care. This does not constitute a dismissal of the claim.

Issue No. 4 in claimant's Application for Review concerns whether another judge should be assigned to hear the matter on remand. The Appeals Board finds that this issue is not properly before the Appeals Board. The Director of the Division of Workers Compensation is responsible for the assignment of cases to the administrative law judges. If claimant's request is in the nature of a petition for refusal by the administrative law judge for bias or prejudice, such a request must first be presented to the administrative law judge for determination. As a practical matter, the claimant's request may in fact be moot as it is the understanding of the Appeals Board that Administrative Law Judge Frobish has been transferred from the Garden City to the Wichita office and that a new administrative law judge has been hired for the Garden City office. Presumably, this case would now be assigned to Judge Kenneth Johnson. In any case, the Appeals Board need not reach the merits, if any, of claimant's request that this matter be assigned to a new judge.

We now turn to the issues as presented in claimant's Brief of Appellant. Issue No. 1 reads, "Was the finding and conclusion of noncompensability supported by substantial competent evidence?" First of all, whether the findings and conclusions of the Administrative Law Judge are supported by substantial competent evidence is not the proper standard to be applied by the Appeals Board upon its review of a preliminary hearing order. Review by the Appeals Board is de novo on the record. Secondly, the Appeals Board finds that it does not have jurisdiction to review this issue. The compensability of claimant's automobile accident was not the issue at preliminary hearing. Rather, the issue decided by the Administrative Law Judge pertained only to whether the traumatic neurosis was causally connected to the physical injury claimant sustained in the automobile accident. This issue pertains to the nature and extent of claimant's disability and not to the compensability of the claim. Accordingly, the Appeals Board lacks

jurisdiction to review this issue on an appeal from a preliminary hearing order. See K.S.A. 44-534a, as amended, and K.S.A. 44-551(b)(2)(A), as amended.

The second and final issue raised by claimant as enumerated in the Brief of Appellant is "Did the court have authority at the preliminary stage of these proceedings to conclude the ultimate issue of compensability?" Again, the Appeals Board finds that the administrative law judge did not "conclude the ultimate issue of compensability." The preliminary hearing Order by the Administrative Law Judge was not a final pronouncement on the compensability of the claim nor was it a final determination on the limited issue of whether claimant's traumatic neurosis was caused by the physical injury. The administrative law judge made a preliminary finding based upon the record as it existed at the time. The preliminary Order Denying Compensation neither precludes claimant from pursuing any issue to regular hearing and final award, nor does it preclude claimant from seeking another preliminary hearing or hearings on the issues of his entitlement to medical treatment and the payment of temporary total disability compensation.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that claimant's Application for Review should be, and is hereby, dismissed and the June 26, 1996, Order of Administrative Law Judge Jon L. Frobish remains in full force and effect.

IT IS SO ORDERED.

Dated this ____ day of September 1996.

BOARD MEMBER

c: Donald E. Shultz, Dodge City, KS
Terry J. Malone, Dodge City, KS
Jon L. Frobish, Administrative Law Judge
Kenneth Johnson, Administrative Law Judge
Philip S. Harness, Director